IN THE

SUPREME COURT OF INDIANA

Cause No. _____

Court of Appeals Cause No. 15A01-1110-CR-00550

DANIEL BREWINGTON,	)	Appeal from Dearborn County Superior Court II
Appellant,	)	
	)	Cause No. 15D02-1103-FD-0084
v.	)	
	)	The Honorable Brian Hill,
STATE OF INDIANA,	)	Special Judge
	)	
Appellee.	)	

BRIEF *AMICI CURIAE* OF EAGLE FORUM, THE HOOSIER STATE PRESS ASSOCIATION FOUNDATION, THE INDIANAPOLIS STAR, THE INDIANA ASSOCIATION OF SCHOLARS, THE INDIANA COALITION FOR OPEN GOVERNMENT, THE JAMES MADISON CENTER FOR FREE SPEECH, NUVO (INDY'S ALTERNATIVE VOICE), AND PROFESSORS JAMES W. BROWN, ANTHONY FARGO, SHEILA S. KENNEDY, AND EUGENE VOLOKH IN SUPPORT OF THE PETITION TO TRANSFER

Eugene Volokh*
MAYER BROWN LLP
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu
*temporary admission pending

James Bopp, Jr.
Justin L. McAdam
THE BOPP LAW FIRM, PC
The National Building
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434, ext. 42
fax: (812) 235-3685
jmcadam@bopplaw.com
Attorneys for *amici curiae*

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INTEREST OF THE *AMICI CURIAE*

Eagle Forum, founded in 1972, is a leading conservative group advocating for American sovereignty, traditional education, and the traditional family. Among other things, it firmly supports citizens' rights to criticize government officials, including judges.

The Hoosier State Press Association Foundation exists to foster public understanding of the role of a free press in society, to increase public literacy, to enhance Indiana newspapers' ability to fully educate and inform the public, and to defend First Amendment principles.

The Indianapolis Star is Indiana's largest daily-circulation paper and the publisher of Pulitzer Prize-winning reporting exploring public-official misconduct and the performance of public institutions. Questions, commentary, and criticism affecting public officials and public institutions are regular features of The Star's news and opinion pages, and such speech could be subject to criminal prosecution if the statute is applied as in the courts below.

The Indiana Association of Scholars is a chapter of the National Association of Scholars, a network of scholars and citizens united by a commitment to academic freedom, disinterested scholarship, and excellence in American higher education.

The Indiana Coalition for Open Government, a nonprofit citizens' advocacy group, protects public rights of access to government records and meetings and supports a broad right to speak about government action.

The James Madison Center for Free Speech, located in Terre Haute, has litigated throughout the country in support of the First Amendment right of all citizens to free political expression.

NUVO, Indianapolis' alternative weekly newspaper and winner of many Indiana Society of Professional Journalists awards (including for investigative reporting), often forcefully expresses

opinions about Indiana officeholders and others and is deeply interested in protecting free speech.

James W. Brown is former Dean (for 28 years) of the School of Journalism, Indiana University-Purdue University Indianapolis. He has a longstanding interest in First Amendment protection for journalism and other public commentary.

Anthony Fargo is Associate Professor at the Indiana University School of Journalism, coauthor of *Criminal Libel in the United States* (International Press Institute 2012), and author of nine law review articles on media law and First Amendment law.

Sheila S. Kennedy is Professor at the School of Public and Environmental Affairs, Indiana University-Purdue University Indianapolis, a regular Indianapolis Business Journal columnist, and a former Indianapolis Star columnist.

Eugene Volokh is Professor of Law at UCLA, author of *The First Amendment and Related Statutes* (4th ed. 2011) and over 35 law review articles on First Amendment law, and coauthor of a blog, http://volokh.com, that sometimes comments on Indiana matters.

SUMMARY OF ARGUMENT

This Court should grant transfer, for two related reasons.

First, the Court of Appeals erroneously interpreted Ind. Code § 35-45-2-1 (2012) to criminalize a broad range of constitutionally protected speech, without recognizing that this would render the statute unconstitutionally overbroad. This endangers the free speech rights of journalists, policy advocates, politicians, and ordinary citizens.

Second, the Court of Appeals decision erroneously labeled Brewington's statements about Judge Humphrey as false statements of fact, rather than the figurative and hyperbolic statements

of opinion that they are. This sets a dangerous precedent, including for ordinary defamation cases.

Amici discuss only Brewington's conviction for intimidation of Judge Humphrey. They express no opinion on his other convictions.

ARGUMENT

I. Ind. Code § 35-45-2-1 Should Be Interpreted to Exclude Speech That Condemns a Person's Public Actions or Uses the Threat of Such Condemnation to Prevent Future Actions

A. The First Amendment Protects Threats of Public Condemnation

I.C. §§ 35-45-2-1(a) & (c) provide, in relevant part,

> (a) A person who communicates a threat to another person, with the intent:
> (1) that the other person engage in conduct against the other person's will; [or]
> (2) that the other person be placed in fear of retaliation for a prior lawful act . . .
> commits intimidation, a Class A misdemeanor.
> . . . .
> (c) "Threat" means an expression, by words or action, of an intention to:
> ([1-5]) unlawfully injure the person threatened or another person, or damage property [or engage in a range of other unlawful conduct]; . . .
> (6) expose the person threatened to hatred, contempt, disgrace, or ridicule; [or]
> (7) falsely harm the credit or business reputation of the person threatened . . . .

"Placed in fear of retaliation" in subsection (a)(2) is not defined, but presumably refers to fear of being subjected to one of the actions in subsection (c) as a result of one's prior lawful act. For instance, it is intimidation to threaten to unlawfully injure one's ex-girlfriend because she broke off the relationship, if the intent is to place her in fear of being unlawfully injured in retaliation for the breakup. This is indeed how the Court of Appeals interpreted "retaliation." *State v. Brewington*, 2013 WL 177923, *8 (Ind. Ct. App. Jan. 17, 2013) ("the State alleged that Brewington's actions were committed with the intent of placing Judge Humphrey in fear by threatening him in retaliation for issuing the divorce decree, and that he intended to threaten by exposing the judge to hatred, contempt, disgrace, or ridicule").

Here is a summary of how the provisions interact:

	(a)(1) (demand that target "engage in conduct against [his] will")	(a)(2) (threat of "retaliation for a prior lawful act")
c(1-5) (threat of unlawful conduct)	Coercive threat of unlawful behavior	Simple threat of unlawful behavior
c(6) (threat of exposing target to hatred, contempt, disgrace, or ridicule)	Usually blackmail, though sometimes *constitutionally protected threats to publicize and condemn behavior if the behavior continues (or is not remedied)*	*Constitutionally protected threats to publicize and condemn behavior*
c(7) (threat of falsely harming credit or business reputation)	Coercive threat of a certain kind of defamation	Simple threat of a certain kind of defamation

The statute is often entirely sound, as in the first row of the table. But, if interpreted literally, the statute would cover two common, and constitutionally protected, forms of speech (italicized in the table). One form consists of threats that, if the target engages does something allegedly harmful—or fails to remedy harms caused by a past action—the speaker will publicly condemn that action. This will be discussed in Part I.B.

The other form, involved in this case, consists of simple threats that one will harshly and publicly criticize the target's past actions, such as:

(1) a columnist's writing, "Legislator A's vote on issue B is ridiculous, and I intend to ridicule him until his constituents view him with contempt";

(2) an advocacy group's picketing a store with signs saying, "The store owner's decision to stock product C is disgraceful, and we hope our speech will expose the owner to disgrace and ostracism";

(3) a politician's saying, "The incumbent's decision D is so foolish that, once I publicize it, the incumbent will be the laughingstock of the state";

(4) a blogger's writing, as in this case, "The judge who restricted my visitation rights was in effect abusing my children through the legal process," with the implied statement, "and I will keep publicly criticizing the judge's actions."

These threats could be express ("I'm outraged by your conduct, and I'll publicly harshly condemn it and ridicule it") or implied (such as a sequence of articles, broadcasts, leaflets, or posts, each implicitly threatening further statements). And these threats would be covered by subsections (a)(2) and (c)(6), because they would involve "communicat[ing] a threat" of exposing the target to "hatred, contempt, disgrace, or ridicule," intending "that the [target] be placed in fear of retaliation" through such "hatred, contempt, disgrace, or ridicule" for his prior lawful act.[1] But each of these statements would nonetheless be protected by the First Amendment.

Two leading United States Supreme Court precedents make this clear. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), a civil rights organization was upset about real estate agent Keefe's behavior—behavior that was legal but, in the views of the Organization, wrong (because it promoted white flight). Organization members therefore leafleted in Keefe's home town, Westchester, and expressly threatened more such leafleting unless Keefe agreed to change his practices; one leaflet said, "When [Keefe] signs the agreement, we stop coming to Westchester." *Id.* at 417. Yet the Court ruled that the speech remained constitutionally protected:

> The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were of-

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[1] The statute covers speech about anyone, though it provides a higher penalty for speech about judges, I.C. § 35-45-2-1(b)(i). In any event, speech about judges is as protected as speech about other officeholders. The First Amendment "gives '[j]udges as persons . . . no greater immunity from criticism than other persons.'" *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

> fensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

Id. at 419 (internal citations omitted).

Similarly, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the NAACP organized a boycott by black residents of white-owned businesses. To make the boycott effective, NAACP members read the names of nonparticipating blacks at church and published them in a local newspaper. *Id.* at 909. Yet though this too threatened exposing people to contempt and disgrace in retaliation for a lawful act—shopping at white-owned stores—the Court held the speech was protected: "Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." 458 U.S. at 909-10.

I.C. § 35-45-2-1 is thus overbroad to the extent that subsection (a)(2) is combined with (c)(6), as it was in this case. The Court of Appeals disagreed, holding that "communicating a threat to a victim to place the victim in fear of retaliation for a prior lawful act, necessarily falls outside the realm of protected criticism of government decisions due to the requirement of criminal intent," namely intent "to place the victim in fear by a threat." 2013 WL 177923, *9. But this is inconsistent with *Organization for a Better Austin* and *NAACP v. Claiborne Hardware*, which held that speech intended to place the victim in fear of ostracism or disgrace is indeed constitutionally protected criticism.

If the Court of Appeals decision is allowed to stand, then much criticism of legislators, executive officials, judges, businesspeople, and others—whether by newspapers, advocacy groups, politicians, or other citizens—would be punishable. This Court should therefore grant transfer,

and hold that subsection (a)(2) cannot be combined with (c)(6). Informing someone (explicitly or implicitly) that one will publicly criticize him for his prior lawful act, with the intent to expose him to hatred, contempt, disgrace, or ridicule, cannot be criminalized.

B. The Court of Appeals' Blackmail Analogy Is Unsound

The Court of Appeals defended its reasoning by analogy to blackmail. 2013 WL 177923, *8. But, while properly crafted blackmail bans are constitutional, *United States v. Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988), the blackmail analogy is unsound here.

First, blackmail "does not consist in threatening to charge an innocent party with crime, or with degrading and disgraceful immoral conduct, but consists in threatening to make such accusation, *with the intent to extort or gain from any person his chattels, money, etc.*" *Eaton v. State*, 238 Ind. 434, 436, 151 N.E.2d 292, 293 (1958). That element is absent from subsection (a)(2), under which Brewington was prosecuted.

And this element of intent to get property (or coerce other action) is significant for First Amendment purposes, because it makes the threat more than just speech—it makes the threat an attempt to induce an imminent action. This extra nonspeech component may sometimes make such a threat constitutionally unprotected (much as solicitation of criminal conduct is unprotected, *United States v. Williams*, 553 U.S. 285 (2008)). But without such an attempt to get property or coerce behavior, a threat simply to speak (as in this case) is just speech.

Second, even bans on blackmail-like coercive threats—"if you don't do X, I'll inform people of Y"—are constitutional only when they exclude situations where X and Y are sufficiently connected (often called the "nexus" exception.) Saying, for instance, "if you don't pay me back the $1000 you stole from me, I'll call the police and tell them about the theft," is constitutionally protected; the threatened revelation (telling police about the theft) is connected to the speaker's

demand (give me back the stolen money). *See, e.g.*, *State v. Weinstein*, 898 P.2d 513, 515 (Ariz. Ct. App. 1995). On the other hand, saying "if you don't pay me $1000, I'll tell the police about your using drugs" is punishable blackmail; there is no nexus between the threatened revelation and the speaker's demand.

Indeed, Arizona, Colorado, Oregon, and Washington courts have struck down statutes that are very similar to I.C. §§ 35-45-2-1(a)(1), (c)(6) because the statutes' lack of a "nexus" exception made them unconstitutionally overbroad. *Weinstein*, 898 P.2d at 515; *Whimbush v. People*, 869 P.2d 1245, 1248 (Colo. 1994); *State v. Robertson*, 649 P.2d 569, 586-88 (Or. 1982); *City of Seattle v. Ivan*, 856 P.2d 1116, 1120-21 (Wash. Ct. App. 1993).[2] And New Hampshire and Washington courts have interpreted such statutes to embody a "nexus" exception so that the statutes would not be unconstitutionally overbroad. *State v. Hynes*, 978 A.2d 264, 278 (N.H. 2009); *State v. Pauling*, 69 P.3d 331, 335 (Wash. 2003).

These decisions are correct, because a wide range of speech potentially covered by statutes such as I.C. §§ 35-45-2-1(a)(1), (c)(6)—in the absence of a "nexus" exception—is constitutionally protected:

1. Threatening to keep publicizing and condemning a real estate agent's practices in order to pressure him into changing those practices is constitutionally protected. *Organization for a Better Austin*, 402 U.S. at 419.
2. Threatening to keep publicizing and condemning shoppers' decisions not to comply with a boycott in order to pressure the shoppers into changing their behavior is constitutionally

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[2] *Robertson* held the law violated the Oregon Constitution, but it relied on First Amendment precedents, such as *Keefe*, *see* 649 P.2d at 585, and has since been cited by First Amendment cases in other states, *see Whimbush*, 869 P.2d at 1248, 1250; *City of Seattle*, 856 P.2d at 1119 n.4; *State v. Steiger*, 781 P.2d 616, 621, 622 n.2 (Ariz. Ct. App. 1989).

protected. *NAACP v. Claiborne Hardware*, 458 U.S. at 909-10; *see also Eagle Books, Inc. v. Jones*, 474 N.E.2d 444, 450 (Ill. Ct. App. 1985) (threats to publicize the identities of pornography buyers were constitutionally protected).

3. A consumer's "threaten[ing] a vendor that unless he is given a refund for a defective product he will complain to the Better Business Bureau" is constitutionally protected. *Pauling*, 69 P.3d at 335; *Weinstein*, 898 P.2d at 515. The same is true when the consumer publicizes his dissatisfaction with plaintiff's product and implicitly threatens further such publicity unless he gets a refund. *E.g.*, *DeGroen v. Mark Toyota-Volvo, Inc.*, 811 P.2d 443, 446 (Colo. Ct. App. 1991); *J.Q. Office Equipment of Omaha, Inc. v. Sullivan*, 432 N.W.2d 211, 214 (Neb. 1988).
4. "[A] store owner['s telling] a customer to pay a delinquent bill or else he will report the customer to a credit reporting agency" is constitutionally protected. *Weinstein*, 898 P.2d at 515.
5. So is "a mother['s informing] her former husband that if he does not pay back child support, she will report him to the court where he risks incarceration." *Id.*
6. So is saying, "[i]f you do not withdraw this research report . . ., I will disclose that you falsified the experiment." *Robertson*, 649 P.2d at 580 n.13.
7. So is a newspaper reporter's "tell[ing] a public official [that] if the public official votes a certain way, the reporter will divulge that the public official will gain from the public body's action." *State v. Steiger*, 781 P.2d 616, 621 (Ariz. Ct. App. 1989); *City of Seattle*, 856 P.2d at 1120 (noting that a provision much like §§ 35-45-2-1(a)(1), (c)(6) could unconstitutionally "impinge on freedom of the press").

8. So is a citizen's "protest[ing] a perceived unlawful arrest by threatening to write a letter to the editor of the local newspaper." *Chaffee v. Roger*, 311 F. Supp. 2d 962, 967 (D. Nev. 2004).

9. So is a citizen's threatening to continue picketing a store until it stops selling a particular product, such as pornography. *Eagle Books*, 474 N.E.2d at 450.

Likewise, *United States v. Jackson*, 180 F.3d 55, 67 (2d Cir. 1999), *rev'd only as to the harmless error analysis*, 196 F. 3d 383 (2d Cir. 1999), stressed that a "nexus" exception to extortion statutes is necessary:

> [N]ot all threats to engage in speech that will have the effect of damaging another person's reputation, even if a forbearance from speaking is conditioned on the payment of money, are wrongful. For example, the purchaser of an allegedly defective product may threaten to complain to a consumer protection agency or to bring suit in a public forum if the manufacturer does not make good on its warranty. Or she may threaten to enlist the aid of a television "on-the-side-of-the-consumer" program. Or a private club may threaten to post a list of the club members who have not yet paid their dues.

See also United States v. Coss, 677 F.3d 278, 286-87 (6th Cir. 2012) (endorsing the *Jackson* analysis). In *Jackson*, the court was interpreting the federal extortion statute, but later courts have relied on *Jackson* in their constitutional analyses and held that a "nexus"-like exception that they read into their statutes makes the statutes constitutional. *See, e.g.*, *Pauling*, 69 P.3d at 336-37; *Hynes*, 978 A.2d at 278; *see also* Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1121 (1984) (suggesting a similar analysis, in the leading scholarly article on the question). And, for much the same reason, most state blackmail, coercion, and extortion statutes that are similar in structure to I.C. §§ 35-45-2-1(a)(1), (c)(6) specifically exclude threats of speech where the threatened revelation has a sufficient nexus to the behavior that the threatener wants to prevent. *See, e.g.*, MODEL PENAL CODE § 212.5 (1985); IOWA CODE ANN. § 711.4 (2012); KY. REV. STAT. ANN. § 514.080(2) (2012).

This "nexus" exception can easily be adapted to I.C. §§ 35-45-2-1(a)(1), (c)(6): If the speaker is trying to get the target to stop certain behavior, by threatening to publicize and condemn that behavior, the nexus is present and the threat is constitutionally protected.

Strictly speaking, this Court does not need to read such a "nexus" exception into subsection (a)(1), because Brewington was prosecuted under subsection (a)(2) (the retaliatory threat provision), not under (a)(1) (the coercive threat provision). Nonetheless, the Court of Appeals did note the blackmail analogy in arguing (a)(2) was constitutional, so this Court should address it as well.

In rejecting that analogy, this Court can explain that even coercive threats of public condemnation are constitutionally protected (and excluded from the statute) so long as there is a "nexus" between the threatened disclosure and the demand—and, in particular, whenever the threat is simply to condemn or ridicule the very act that the speaker is trying to prevent. *Amici* urge this Court to so hold, in order to prevent the chilling effect on Indiana citizens' speech stemming from the apparent breadth of subsections (a)(1) and (c)(6), and from prosecutors' willingness (displayed in this case) to read the statute broadly as covering criticism of public servants' official acts.

II. The Court of Appeals Erred in Concluding that Brewington's Speech Was Knowingly False, an Error That Will Work Mischief in Future Defamation Cases

To the extent that the Court of Appeals defended its decision by casting Brewington's speech as a knowingly false statement of fact, the court's holding was inconsistent with United States Supreme Court decisions, and set a dangerous precedent about what it means for speech to be knowingly false. The Court of Appeals concluded that § 35-45-2-1 equally covers true and false speech. 2013 WL 177923, *8. But the court also concluded that, "Even if the State was required

to prove that Brewington knew his internet postings and other communications about Judge Humphrey were false, there is ample evidence of Brewington's knowledge," *id.* at *9:

> [Brewington's] public comments went well beyond hyperbole and were capable of being proven true or false. Over the course of at least a year, Brewington repeatedly called Judge Humphrey a "child abuser." State's Ex. 170; *see also* State's Ex. 162 ("Judge Humphrey's actions constitute child abuse"), State's Ex. 168 ("abuser of children"), State's Ex. 173 (Judge Humphrey "abuse[s] children who are part of the family court system"). Brewington also called Judge Humphrey "corrupt," State's Ex. 160, and accused him of engaging in "unethical/illegal behavior." State's Ex. 170.
>
> . . . Judge Humphrey, in the exercise of lawful judicial discretion and out of concern over Brewington's history of "irrational behavior," State's Ex. 140, p. 8, imposed reasonable visitation restrictions upon Brewington out of a desire to protect the children's well-being. Only by willfully misinterpreting the terms of the divorce decree in bad faith could one argue that Judge Humphrey's conduct constituted an intentional act to harm Brewington's children.

Id. at *9.

But Brewington's statements were indeed hyperbolic and constitutionally protected expressions of opinion. No reasonable reader would understand the posts as accusing Judge Humphrey of literally "abus[ing] children" in the sense of beating them or of having an "intent[]" to physically harm children. In context, Brewington was clearly just arguing that Judge Humphrey's actions were unjustified and harmful to Brewington's children—both matters of Brewington's opinion.

The United States Supreme Court has long recognized that accusations can often be figurative and hyperbolic, and can be viewed by reasonable readers as statements of opinion and not as factual assertions, even if they literally use the names of crimes. In *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970), a developer had won a defamation verdict based on articles in which his negotiating conduct was described as "blackmail." The United States Supreme Court overturned the verdict, reasoning:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public

> and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

Id. at 14 (footnote omitted). The same is true here: No reader could have thought that "Brewington accused Judge Humphrey of child abuse," 2013 WL 177923, *9, in any literal sense.

Likewise, in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 268, 284 (1974), the Court concluded that a union's characterization of strikebreakers as committing "treason" would have been read not as referring to the crime of treason but rather as having been used "in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization." Likewise, a reasonable reader would see Brewington's "child abuse" statements as having been used "in a loose, figurative sense to demonstrate [Brewington]'s strong disagreement" with Judge Humphrey's decision.

Nor does it matter that the Court of Appeals believed that the visitation restrictions on Brewington were "reasonable" and made "out of a desire to protect the children's well-being"—just as it would not have mattered in *Greenbelt* whether the Justices saw Bresler's negotiating conduct as "reasonable" or made out of a desire to advance the public's well-being. Brewington's opinion that Judge Humphrey's actions were wrong is constitutionally protected whether or not others think those actions were reasonable. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

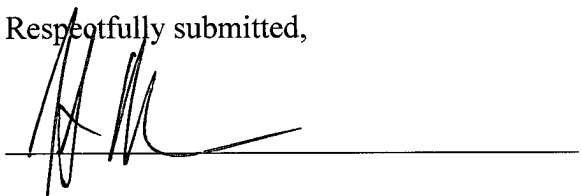
The same is true of Brewington's statements that "[p]ublic awareness is the only way to fight this kind of corruption," Exh. 171, at 7, and "[i]n case there is any doubt about the unethi-

cal/illegal behavior of Judge Humphrey and Dr. Edward J. Connor," Exh. 170, at 6. Reasonable readers, reading the statements in context, would see them as simply representing Brewington's opinion that what happened in his case was "corrupt" and "unethical" in the sense of departing from justice and proper conduct as Brewington saw it.

CONCLUSION

For the reasons given above this, *amici* ask this Court to grant transfer, and reverse the Court of Appeals' decision upholding Brewington's conviction for intimidating Judge Humphrey.

Respectfully submitted,



Eugene Volokh, Ind. 3993-95-TA*
MAYER BROWN LLP
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu
*temporary admission pending

James Bopp, Jr., 2838-84
Justin L. McAdam, 30016-49
THE BOPP LAW FIRM, PC
The National Building
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434
fax: (812) 235-3685
jmcadam@bopplaw.com

Attorneys for *amici curiae*

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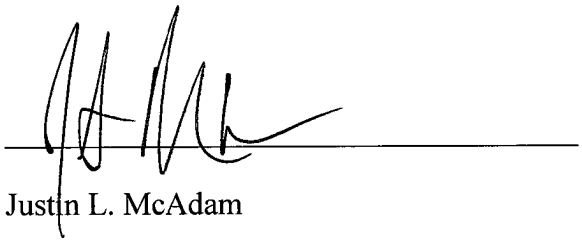


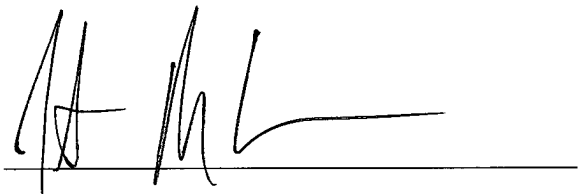
Justin L. McAdam

CERTIFICATE OF SERVICE

I certify that on February 15, 2013, a copy of the Brief *Amici Curiae* was served on the following by Federal Express First Overnight delivery, postage prepaid, to:

James Whitehead
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204

Michael K. Sutherlin
Samuel M. Adams
MICHAEL K. SUTHERLIN & ASSOCIATES
P.O. Box 441095
Indianapolis, IN 46244-1095



Justin L. McAdam